BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

CATHY L. SWATHWOOD	)	
(a/k/a CATHY CHRISTIANSEN)	)	
Claimant	)	
VS.	)	
	)	Docket No. 270,543
MEDICALODGE OF COLUMBUS	)	
Respondent	)	
AND	)	
	)	
TRAVELERS INSURANCE COMPANY	)	
Insurance Carrier	)	

ORDER

Claimant appeals the June 13, 2005 Award of Administrative Law Judge Kenneth J. Hursh. Claimant was denied permanent benefits in excess of claimant's functional impairment after the Administrative Law Judge (ALJ) determined that claimant's termination from her employment with respondent was the result of bad faith actions on claimant's part. Therefore, claimant was imputed the wage she was earning at the time of her employment with respondent and, under K.S.A. 44-510e, was limited to her functional impairment. The Appeals Board (Board) heard oral argument on October 18, 2005.

APPEARANCES

Claimant appeared by her attorney, William L. Phalen of Pittsburg, Kansas. Respondent and its insurance carrier appeared by their attorney, Blake Hudson of Fort Scott, Kansas.

RECORD AND STIPULATIONS

The Board has considered the record and adopts the stipulations contained in the Award of the ALJ. In addition, the parties stipulated at oral argument that the transcript of the settlement hearing held March 29, 2001, before the Honorable Garry W. Lassman in Docket Nos. 239,709 and 239,710, with attachments, is part of this record. The parties further stipulated that the claimant, Cathy Christiansen, named in that settlement transcript, is the same person as the claimant, Cathy Swathwood. The parties further stipulated that the temporary partial disability paid in the amount of $1,904.68 should be converted into

temporary total disability compensation, with respondent being entitled to appropriate credit for those recomputed weeks as temporary total disability compensation.

Claimant's attorney advised that the lien filed by the Spigarelli law firm will be resolved with appropriate documentation provided to the Board regarding the resolution of that lien.

ISSUE

What is the nature and extent of claimant's injury and disability?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the entire evidentiary file contained herein, the Board finds the Award of the ALJ should be affirmed.

Claimant, a long-time employee of respondent, was terminated on January 26, 2004, after a dispute arose regarding comments claimant allegedly made when her office was being relocated. Claimant had been employed with respondent as a social services designee, having worked for respondent for a total of 15 years. On September 5, 2001, claimant and another employee were taking a resident to a doctor's appointment. When the resident and the other employee started to fall, claimant stepped in and, in attempting to prevent the resident from falling, injured her back. Claimant was immediately sent to Dr. Rivas for medical care, ultimately receiving medical care from a number of doctors, including Dr. Karshner, Dr. Wilson, Dr. Cole, Dr. Pinkerton and Dr. Knudson. Claimant returned to work for respondent in an accommodated position in December of 2001 and remained in an accommodated position until the termination in January of 2004.

On March 26, 2002, claimant was examined by Pedro A. Murati, M.D., board certified in physical medicine and rehabilitation, at the request of her attorney. Dr. Murati found claimant to have suffered a 10 percent impairment to the body as a whole based upon the fourth edition of the AMA *Guides*.[1] He applied work restrictions at that time. Those restrictions limited claimant to occasional lifting and carrying, pushing and pulling up to 20 pounds; allowed her to occasionally sit, climb stairs, climb ladders, squat and drive; allowed her to frequently stand and walk; prohibited her from crawling; allowed her to bend only rarely; prohibited her from lifting and carrying, pushing and pulling in excess of 20 pounds; and allowed her to frequently lift and carry, push and pull up to 12 pounds. In addition, she should alternate sitting, standing and walking, and use good body mechanics at all times.

[1] American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.).

Claimant was again examined by Dr. Murati on September 1, 2004, at which time he diagnosed claimant with low back pain, symptoms of poly radiculopathy and right SI joint dysfunction. He assessed claimant a 20 percent impairment to the body as a whole pursuant to the fourth edition of the AMA *Guides*[2] as a result of her work injuries. Dr. Murati was provided a task list prepared by vocational expert Karen Crist Terrill. Dr. Murati opined claimant had lost the ability to perform sixteen of the fifty-one tasks identified in the list, for a 30 percent task loss.[3]

Claimant discussed with Dr. Murati a prior work-related accident that occurred in 1998, at which time she suffered a ruptured disc and three bulging disc. Claimant entered into a settlement on March 29, 2001, for those injuries. Attached to the settlement worksheet (which the parties agree is part of this record, including the medical reports) is a report from orthopedic surgeon Daniel M. Downs, M.D. Dr. Downs, in reviewing claimant's condition, found claimant to have a 12 percent impairment to the body as a whole based upon the November 1997 and September 11, 1998 injuries suffered by claimant while working for respondent. Dr. Downs' opinion is pursuant to the fourth edition of the AMA *Guides*.[4] Claimant acknowledged that the injuries suffered in the earlier accidents were to the same part of her back as injured in September of 2001.

Claimant's employment with respondent terminated on January 26, 2004, after a meeting with several respondent representatives. Numerous depositions were taken detailing the facts leading up to claimant's termination. The significant testimony was provided by Janie Jarrett, respondent's administrator. While Ms. Jarrett was not the administrator on the date of claimant's September 5, 2001 accident, she did become the administrator on September 18, 2001, and was working in that capacity when claimant returned to her accommodated position on December 1, 2001. She was aware of claimant's restrictions and testified that claimant was never asked to work outside of those restrictions.

Claimant's termination resulted from numerous conferences between Ms. Jarrett and claimant, including a written warning in October of 2002, the existence of which was denied by claimant in her testimony, but was signed by claimant at the time the warning was issued. Additionally, Ms. Jarrett testified to several verbal conferences with claimant regarding claimant's attitude, and incidents of insubordination. Three of these verbal conferences were identified as occurring on May 3, 2002, June 3, 2003, and September 23, 2003. Claimant also denied that any of these verbal conferences had occurred.

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[2] AMA *Guides* (4th ed.).

[3] The correct task loss is 31 percent (16 ÷ 51 = 31 percent). If work disability is awarded, the Board will adjust the task loss percentage accordingly.

[4] AMA *Guides* (4th ed.).

Claimant testified that her termination of employment was the result of respondent's inability to accommodate her in her position anymore. This lack of ability to accommodate was denied by several respondent witnesses. The testimony by respondent's witnesses was that claimant was asked to move her office. In response to the pending office move, which irritated claimant, claimant threatened to place her desk in a way that she would have to crawl over the desk and, as a result, would suffer injury and file a workers compensation claim. Claimant denies making this comment, although several respondent representatives testified to hearing the comment. The representatives, including Deanna Fitz, respondent's dietary manager, Amy Higgins, respondent's director of nursing, and Ms. Jarrett, deny claimant was ever advised that the termination was connected to respondent's inability to accommodate her position. Respondent's representatives who testified agree that the termination resulted from problems associated with claimant's performance, including negative attitude, and incidents of insubordination. Ms. Jarrett noted that the written warning from October of 2002 stated that continued violations of respondent's policies could result in claimant's suspension or termination. As noted above, claimant denied the existence of this written warning, even though it was contained in the file and had been signed by claimant.

In workers compensation litigation, it is the claimant's burden to prove her entitlement to benefits by a preponderance of the credible evidence.[5] In this instance, the ALJ determined that claimant was limited to her permanent functional impairment, finding that her termination for cause limited claimant's award, denying her a permanent partial general disability under K.S.A. 44-510e. The Board concurs. K.S.A. 44-510e allows for permanent partial general disability when an employee is disabled, with permanent partial general disability defined as,

> . . . the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. . . . An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.[6]

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[5] K.S.A. 44-501 and K.S.A. 2001 Supp. 44-508(g).

[6] K.S.A. 44-510e.

However, that statute must be read in light of *Foulk.*[7] In *Foulk*, the Kansas Court of Appeals held that a worker could not avoid the presumption against work disability as contained in K.S.A. 1988 Supp. 44-510e (the predecessor to the above quoted statute) by refusing an accommodated job that paid a comparable wage. In this instance, while claimant did not refuse an accommodated job that paid a comparable wage, she was terminated from her employment as a result of insubordination and other difficulties associated with her ongoing employment. The Board finds claimant's efforts to not constitute a good faith effort on her part to remain in her employment with respondent.

> If a finding is made that a good faith effort has not been made, the factfinder *[sic]* will have to determine an appropriate post-injury wage based on all the evidence before it, including expert testimony concerning the capacity to earn wages. . . .[8]

In this instance, claimant was working in an accommodated position at a comparable wage when her activities resulted in her termination of employment. The Board finds claimant did not act in good faith in failing to retain her employment with respondent and, therefore, pursuant to *Copeland*, the Board will impute to claimant the wages she was earning at the time of her termination. As those wages exceed 90 percent of the wages claimant was earning at the time of the injury, the Board finds that claimant is limited to her functional impairment pursuant to *Foulk* and *Copeland*.

Claimant was assessed a 20 percent impairment to the body as a whole by Dr. Murati. That is the only impairment opinion in the record for these injuries associated with the September 5, 2001 incident.

K.S.A. 44-501(c) allows a respondent credit for a preexisting condition which a claimant may have suffered. The award of compensation is then reduced by the amount of functional impairment determined to be preexisting. In this instance, claimant settled a prior workers compensation claim with this respondent for injuries suffered to the same part of her back. The settlement report with attached medical exhibits (which the parties have stipulated is part of this record) contains a medical report from Dr. Downs, assessing claimant a 12 percent impairment to the body as a whole based upon the fourth edition of the AMA *Guides*.[9] As K.S.A. 44-510e obligates that a functional impairment be determined based upon the fourth edition of the AMA *Guides*, the Board finds that this evidence is sufficient to allow respondent the reduction in benefits as allowed by K.S.A. 44-501(c) . Claimant's functional impairment of 20 percent is, therefore, reduced by the 12 percent

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[7] *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995).

[8] *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 320, 944 P.2d 179 (1997).

[9] AMA *Guides* (4th ed.).

preexisting functional impairment, and the 8 percent corresponding award of the ALJ in this matter is, therefore, affirmed.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of the ALJ, assessing claimant an 8 percent impairment to the body as a whole based upon the injuries suffered on September 5, 2001, should be, and here is, affirmed.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Kenneth J. Hursh dated June 13, 2005, should be, and is hereby, affirmed in all regards.

IT IS SO ORDERED.

Dated this ____ day of November, 2005.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: William L. Phalen, Attorney for Claimant
Blake Hudson, Attorney for Respondent and its Insurance Carrier
Lori A. Fleming, Attorney at Law
Bryce Moore, Attorney at Law
Kenneth J. Hursh, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director